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Supreme Court, U. S.
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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM 1972 72-191

HUMBLE OIL & REFINING COMPANY,
Petitioner,

versus

ROBERT S. CALVERT, Comptroller of Public Accounts, JESSE JAMES, State Treasurer, and CRAWFORD MARTIN, Attorney General, Officials of the State of Texas,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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August 3, 1972

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
I. The oil and gas severance taxes are measured by value without regard to whether the producer has income	8
II. The definition of an income tax under the Buck Act does not include an occupation tax based on value of the product produced without regard to income of the producer	11
III. The court below erroneously held that under Federal law the Texas oil and gas severance taxes were income taxes	14
CONCLUSION	20
APPENDIX	
I. Judgment of the 126th Judicial District Court	22
II. Opinion of the Court of Civil Appeals	24
III. Opinion and denial of rehearing of the Supreme Court of Texas	34
IV. Statutory definition of "market value" of gas under the Texas gas production tax	46

TABLE OF AUTHORITIES

Cases

Commissioner v. *Glenshaw*, 348 U.S. 426	15
Commissioner v. *LoBue*, 351 U.S. 243	15, 16
Commissioner v. *Wilcox*, 327 U.S. 404	15
Eisner v. *Macomber*, 252 U.S. 189	17
Helvering v. *Bruun*, 309 U.S. 461	16

PAGE

Howard v. *Commissioners of the Sinking Fund of the City of Louisville*, 344 U.S. 624 14

James v. *Dravo Contracting Company*, 302 U.S. 134 12

Mississippi River Fuel Corp. v. *Cocreham*, 382 F.2d 929 (5th Cir. 1969), cert. denied, 390 U.S. 1014 13

Old Colony Trust Co. v. *Commissioner*, 279 U.S. 716 15

State v. *Humphrey*, 159 S.W.2d 162 (1941) no writ history.. 10

Miscellaneous

Treasury Regulations §1.61-3 ..... 9, 18

Opinion of Texas Attorney General No. 0-182 (1939) 10

Opinion of Texas Attorney General No. 0-5871 (1944) 10

Senate Report No. 1625, 76th Congr., 3rd Sess. 11, 12

R. McGILL, TAXABLE INCOME (1945 ed.) 17, 18

Treasury Regulations §1.61-14 18

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioner, Humble Oil & Refining Company (a Delaware corporation) respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Texas in this proceeding.

OPINIONS BELOW

The opinion of the 126th Judicial District Court of Travis County, Texas, is not reported but is reproduced as Appendix I hereto. It also appears in the record at Tr. p. 109. The opinion of the Court of Civil Appeals, Third Supreme Judicial District of Texas, is reported at 464 S.W.2d 170 and is also reproduced as Appendix II hereof. The opinion of the

Supreme Court of Texas is reported at 478 S.W.2d 926 and is also reproduced as Appendix III hereof.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on March 29, 1972. Petitioner timely filed a motion for rehearing which the Supreme Court of Texas denied on May 10, 1972, and this petition for certiorari was filed within 90 days of that date as required by 28 U.S.C. 2101(c). The court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

The question presented for decision is whether the Texas oil and gas production taxes levied by Chapters 4 and 3 respectively of Title 122A, Taxation-General, Vernon's Texas Civil Statutes are "income taxes" within the meaning of the Buck Act, Act of October 9, 1940, 54 Stat. 1059, Title 4, U.S.C. §§ 105-110, and thus may be levied by the State of Texas on petitioner's production of oil and gas from the Corpus Christi Naval Air Station, a federal enclave over which Texas had ceded exclusive jurisdiction to the United States in accordance with Article I, Section 8, Clause 17 of the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 4:

> § 106 *Same; income tax* — (a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing

authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

• • •

§ 110 *Same; definitions* — As used in sections 105-109 of this title —— . . . (c) The term "income tax" means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.

Title 122A, Taxation-General, Vernon's Texas Civil Statutes:

Art. 3.01 *Calculation of Tax*

(1) There is hereby levied an occupation tax on the business or occupation of producing gas within this State, computed as follows:

A tax shall be paid by each producer on the amount of gas produced and saved within this State equivalent to seven and one-half percent (7½%) of the market value thereof as and when produced.

Provided, however, that the amount of the tax on sweet and sour gas shall never be less than 121/1500 of one cent (1¢) per thousand (1,000) cubic feet.

(2) In calculating the tax herein levied, there shall be excluded:

(a) gas injected into the earth in this State, unless sold for such purpose;

(b) gas produced from oil wells with oil and lawfully vented or flared;

(c) gas used for lifting oil, unless sold for such purposes.

Art. 3.02 *Market Value* — See Appendix IV.

Art. 4.02 *Amount and Computation of Tax*

(1) There is hereby levied an occupation tax on oil produced within this state of four and six-tenths cents (4.6¢) per barrel of forty-two (42) standard gallons. Said tax shall be based upon the total barrels of oil produced or salvaged from the earth or waters of this state without any deductions and shall be computed (a) by tank tables showing one hundred percent (100%) of production and exact measurements of contents or (b) by meter or by other measuring device which accurately determines the volume of "production" or "total oil produced." Provided, however, that the occupation tax herein levied on oil shall be four and six-tenths percent (4.6%) of the market value of said oil whenever the market value thereof is in excess of One Dollar ($1) per barrel of forty-two (42) standard gallons. The market value of oil, as that term is used herein, shall be the actual market value thereof plus any bonus or premiums or other things of value paid therefor or which such oil will reasonably bring if produced in accordance with the laws, rules and regulations of the State of Texas.

STATEMENT OF THE CASE

This action is a suit by Petitioner against Robert S. Calvert, Comptroller of Public Accounts, Jesse James, State Treasurer, and Crawford Martin, Attorney General, Officials of the State of Texas, brought for the recovery of certain sums paid under protest to the State of Texas asserted by the State to be due it under Chapters 3 and 4, Title 122A, Taxation-General, and Article 6032, Vernon's Texas Civil Statutes, as a result of production of oil and gas from the Corpus Christi Naval Air Station.

At the time of execution by the United States of the oil and gas lease to petitioner in 1962, the Corpus Christi Naval Air Station was owned in fee by the United States and the area included within such station was a federal

enclave with exclusive jurisdiction in the United States except for the right reserved to the State of Texas to serve process.

The State contended, and petitioner denied, that the execution of the oil and gas lease taken in connection with certain language in the deed of cession of jurisdiction from Texas to the United States returned jurisdiction to the State to validly levy and collect the occupation taxes involved in this suit.

The State also contended, and petitioner denied, that the taxes involved were income taxes within the meaning of the Buck Act, §§ 105-110, Title 4, United States Code, an act receding to the states jurisdiction to levy and collect certain taxes in areas of exclusive federal jurisdiction.

The trial court, sitting without a jury, found and concluded as a part of the judgment entered that the taxes were not income taxes within the scope of the Buck Act, but further held that the execution of the oil and gas lease by the United States effected a recession to the State of jurisdiction to levy and collect the occupation taxes involved in this suit and rendered judgment that this petitioner take nothing by its suit.

Petitioner appealed the trial court's judgment to the Court of Civil Appeals for the Third Supreme Judicial District of Texas. The State filed cross-assignments alleging error in the trial court's Buck Act finding as to the oil and gas severance taxes (Chapters 3 and 4, Title 122A, Taxation-General, Vernon's Texas Civil Statutes) but not as to the Regulation Pipeline Tax (Article 6032, Vernon's Texas Civil Statutes). The Court of Civil Appeals, reforming the judgment of the trial court, held that the oil and gas severance taxes were income taxes within the meaning of the Buck Act, that the execution of the oil and gas lease

by the United States to Humble in 1962 did not effect a recession to the State of jurisdiction, reversed the trial court and rendered judgment for petitioner for the Regulation Pipeline Tax under Article 6032, but affirmed the trial court's judgment for the State with respect to the occupation taxes under Chapters 3 and 4 of Title 122A, Taxation-General, Vernon's Texas Civil Statutes.

The petitioner made application to the Supreme Court of Texas for a writ of error to review the judgment of the Court of Civil Appeals for the Third Supreme Judicial District. The Supreme Court of Texas granted petitioner's application for writ of error and affirmed the judgment of the Court of Civil Appeals holding that the execution of the oil and gas lease by the United States to Humble in 1962 did not effect a recession to the State of jurisdiction, that the occupation taxes levied under Chapters 3 and 4 were income taxes within the meaning of the Buck Act, rendered judgment for petitioner for the Regulation Pipeline Tax under Article 6032 and rendered judgment for the State with respect to the severance taxes under Chapters 3 and 4.

Virtually all of the facts in the case were stipulated, the only witnesses being two tax accountants, called by petitioner, whose testimony was not disputed. In essence, the evidence and facts stipulated revealed the following:

In 1940, the United States condemned approximately 2,000 acres for use as a naval air station and was awarded fee simple ownership. Later in the same year, pursuant to Article I, Section 8, Clause 17, of the United States Constitution, the Governor of Texas (O'Daniel) ceded exclusive jurisdiction over the condemned land to the United States. The State retained only the power to serve process in the enclave.

In 1962, in order to prevent drainage by peripheral drilling, the petitioner was awarded a "protective oil and gas lease". A 1/6 royalty was retained by the United States. Petitioner was successful in its drilling, paid the oil and gas production taxes and the Regulation Pipeline Taxes to the State of Texas under protest and filed this action to recover such taxes.

The evidence and stipulated facts revealed that not all of the oil produced by petitioner from the Corpus Christi Naval Air Station lease is sold and that which is sold is not sold at the moment of production but is commingled with oil from other fields and transported to a single selling location. All of the gas is processed in gas processing plants for its liquid content before being sold or utilized. Some of the gas after being processed is consumed by petitioner as fuel in lease operations and as fuel in petitioner's refinery more than two hundred miles distance from the lease. Some of the oil is transported to petitioner's refineries and manufactured into finished products before being sold. The evidence further revealed that although petitioner is required to pay the oil and gas severance taxes on the value of all the oil and gas produced from the lease when produced, no income is realized by petitioner for federal income tax purposes absent a sale of the oil and gas or the products manufactured therefrom.

The evidence further revealed that although the statutory measure of the gas severance tax is "market value", the taxable value in some instances is arbitrary and bears no relation whatsoever to the actual value received by the producer for his gas where sold.

The Supreme Court of Texas, citing federal income tax cases, held that the severance taxes levied by Chapters 3 and 4 were income taxes under the Buck Act because

"[t]he essence of income is an inflow constituting an accretion to wealth, identifiable and measurable in money or money's worth, though not necessarily in cash." Under this definition, the court held that when the oil and gas is produced and severed by petitioner, it has been reduced to possession and has come within the dominion and control of petitioner, thus there has been an accretion to wealth, an economic gain in money or money's worth.

REASONS FOR GRANTING THE WRIT

I. The oil and gas severance taxes are measured by value without regard to whether the producer has income.

The Texas gas production tax levied on the occupation of producers of gas by Chapter 3, Title 122A, Taxation-General, Vernon's Texas Civil Statutes, levies a tax on the market value of gas as and when produced and saved regardless of what disposition is made of the gas by the producer. The oil production tax levied on the occupation of producers of oil by Chapter 4, Title 122A, Taxation-General, Vernon's Texas Civil Statutes, levies a tax of four and six-tenths cents (4.6¢) per barrel of oil produced except that if the oil has a market value in excess of one dollar ($1) per barrel, the tax shall be 4.6 percent of such market value. This tax also applies regardless of what disposition is made of the oil by the producer.

The statutes levy the occupation taxes on petitioner and on every other producer statewide. Petitioner is not a separate taxpayer as to the portion of its severance occupation carried on with regard to each well or with regard to each lease or with regard to each unit or with regard to each reservoir or field. In keeping with the single and statewide application of each of the tax statutes, the Respon-

dents stipulated, Statement of Facts, p. 48-49, that except for the Corpus Christi Naval Air Station lease, petitioner includes all its Texas producing activities on a single severance tax report, the Corpus Christi Naval Air Station lease being singled out for separate reporting only because of the protested tax payments. The oil and gas severance taxes are each single and indivisible taxes applying to each producer's operations in Texas. Their total application should be examined to determine whether they are income taxes within the Buck Act.

Not all of the oil and gas produced from the Naval Air Station lease is sold. Petitioner's Exhibit 1 (Stipulation). But severance taxes are levied throughout the State without regard to whether the production is sold or whether it is consumed as fuel or in manufacturing operations. Of course, without a sale, no income is realized under Federal Income Tax Statutes, and the lessee's income tax reports record no income absent a sale. Statement of Facts, p. 42-43. See also Treasury Regulations Section 1.61-3[1].

Article 3.02 (see Appendix IV) defines what is meant by "market value" of gas as used in Article 3.01, the levy statute. This definition contains a number of provisions which are arbitrary and are based neither upon the true market value, nor upon net income, gross income, or gross receipts. The evidence in this case demonstrates that in many cases where gas or the liquid products extracted therefrom are sold, market value, the measurement of the gas severance tax, bears no relation to the proceeds received by the producer.

Article 4.02 levies a production tax upon the total barrels of oil produced without deductions of any kind and without regard to whether the oil is saved. While the gas statute

[1] Infra page 18.

applies only to gas "saved", the oil statute applies to all oil produced. Both the language of, and the administrative and judicial application given this tax establish it as a tax upon the act of producing oil without regard to whether the producer has net income, gross income, or gross receipts. It is not even required that he or anyone else retain or hold anything of value in consequence of the pursuit of the taxed occupation of severing the oil.

The Attorney General of Texas has, in at least two opinions, both of long standing application, held that it makes no difference whether the operator saves oil for any beneficial use or purpose. When the operator severs the oil from the earth, the oil production tax is owed to the State, Opinions Nos. 0-5871, 1944; and 0-182, 1939; Petitioner's Exhibits Nos. 2 and 5, respectively. The opinions make clear the application of the tax to the act of severance measured by the value of the oil without regard to whether the operator succeeds in retaining only a part of such oil or none of it.

The Beaumont Court of Civil Appeals in *State* v. *Humphrey*, 159 S.W.2d 162 (1941), no writ history, has so applied the oil production tax. There Humphrey and others had illegally produced 102,000 barrels of oil in Gregg County, Texas, and had stored such oil in storage tanks. Pursuant to Article 6066(a), Vernon's Texas Civil Statutes, the State of Texas brought a forfeiture proceeding against Humphrey and others, seized and sold the oil. When the producers refused to pay the severance and regulation pipeline taxes levied on the oil produced under Articles 7057 (a) (predecessor to Article 4.02) and 6032, Vernon's Texas Civil Statutes, respectively, the State brought an action to recover such taxes. The defendants contended that since the oil was illegally produced and seized by the State, the tax

was not due. In holding that the tax was an occupation tax on the act of producing the court at page 164 said:

> *The moment the oil was produced, the tax accrued* — that is the moment oil is taken from the ground, a tax measured by the number of barrels of oil taken accrues, and under the statute is payable the 15th of the next month. This tax does not depend on what becomes of the oil, whether it is sold, stolen, or destroyed, *because the tax is not a gross proceeds tax, a sales tax, or a transfer tax, but an occupation tax,* so denominated by part (1) of Section 2 of Article 7057(a), R.S. (Emphasis supplied.)

Thus, the taxes on oil and gas production are levied at the moment of production based on the value of production in some cases and on arbitrary value in other cases without regard to whether the producer realizes income from such production.

II. The definition of an income tax under the Buck Act does not include an occupation tax based on value of the product produced without regard to income of the producer.

The Buck Act, Act of October 9, 1940, 54 Stat. 1059, 4 U.S.C. §§ 105-110, recedes to the states jurisdiction to levy certain taxes, including "income taxes", within areas of exclusive federal jurisdiction. The language of the Buck Act includes authority to levy income taxes defined as follows:

> (c) . . . Any tax levied on, with respect to, or measured by, net income, gross income or gross receipts.

The Senate Finance Committee of the United States Congress in Senate Report No. 1625, 76th Congr. 3rd Sess., page 3 (Respondent's Exhibit No. 4) gives two examples as reasons for receding jurisdiction to the states to levy

income taxes within areas of exclusive federal jurisdiction as follows:

> . . . One of the reasons for removing the above exemption is because of an inequity which has arisen under the Public Salary Tax Act of 1939. Under that Act a State is permitted to tax the compensation of officers and employees of the United States when such officers and employees reside or are domiciled in that State, but is not permitted to tax the compensation of such officers and employees who reside within federal areas within such State. For example, a naval officer who is ordered to the Naval Academy for duty and is fortunate enough to have quarters assigned to him within the Naval Academy grounds is exempt from the Maryland income tax because the Naval Academy grounds are a federal area over which the United States has exclusive jurisdiction; but his less fortunate colleague, who is also ordered there for duty, and rents a house outside the Academy grounds because no quarters are available inside, must pay the Maryland income tax on his Federal salary. Another reason for removing the above exemption, is that under the doctrine laid down in *James* v. *Dravo Contracting Company*, (302 U.S. 134, 1937), a State may tax the income or receipts from transactions occurring or services performed in an area within the State over which the United States and the State exercise concurrent jurisdiction but may not tax such income or receipts if the transaction occurred or the services were performed in an area within the State over which the United States has exclusive jurisdiction.

The first example was the Maryland income tax, a tax based on net income of individuals. The second example, the tax under consideration in *James* v. *Dravo Contracting Company*, 302 U.S. 134 (1937), was an annual privilege tax in West Virginia, known as the Gross Sales and Income Tax Law. The statute specifically levied the tax at the rate

of "two percent of the gross income of the business." The Maryland income tax was a typical or traditional net income tax; the West Virginia tax was a typical or traditional gross income tax.

Petitioner submits that had the Congress intended to include within the Buck Act occupation taxes such as the Texas oil and gas production taxes, which are levied without regard to whether the taxpayer has income, either net or gross, it would specifically have added the term "value" in its definition of the income tax. Value is by no means synonymous with net income, gross income or gross receipts. Of course, if one transfers an object with value to another other than by gift, the transferee may realize income in all or some part of such value and an "income tax" may be levied upon the transferee. One who performs services in connection with or upon an object, such as producing one's own oil or gas, may be taxed in an amount measured by the value of the object without the object being transferred to him and without the necessity that he share in receipts from the sale of the object, but the tax is not an income tax. Similarly, if one owns an object, he may be taxed because of mere ownership in an amount measured by the value of such object but such tax is not an income tax.

In *Mississippi River Fuel Corp.* v. *Cocreham*, 382 F.2d 929 (5th Cir. 1969), cert. denied, 390 U.S. 1014, the State of Louisiana contended that the Louisiana severance taxes, measured by volume of production, should be held to be Buck Act taxes. The Court of Appeals for the Fifth Circuit in denying this contention at page 940 stated:

> Congress has authorized the state to impose an income tax on private persons in federal enclaves, but the Louisiana severance tax is simply not an income tax. *We are not free to expand the technical and precise language that Congress has used.* (Emphasis supplied.)

III. The court below erroneously held that under Federal law the Texas oil and gas severance taxes were income taxes.

The Supreme Court of Texas proceeded initially from the correct premise laid down by this court in *Howard* v. *Commissioners of the Sinking Fund of the City of Louisville*, 344 U.S. 624 (1953), that one must look to federal law to determine whether a tax is an income tax within the meaning of the Buck Act. The majority opinion in that case at page 629 says:

> In the instant case, the Kentucky Court of Appeals correctly stated that the question was whether the tax was an income tax within the meaning of federal law.

The opinion of the court below, as it deals with income for federal income tax purposes and the application of the Buck Act, proceeds from certain rather basic assumptions which petitioner believes to be in error. The court below in determining that the production of oil and gas by petitioner from the Corpus Christi Naval Air Station resulted in income to the petitioner at the time the oil and gas was severed, adopted an economist's definition or concept of income which this court has refused to accept for purposes of determining whether there is income for federal income tax purposes. It is stated in the opinion of the court below that the Texas oil and gas production taxes attach when the minerals have been produced and severed from the earth, when they have been reduced to possession and have come within the dominion and control of the producer. It is further stated that at this point, there has been an inflow of wealth, an accretion to wealth, an economic gain in money or money's worth.

The court below failed to recognize that in all the federal income tax cases cited in its opinion, it was fundamental that the accretion to wealth was "realized". In *Commis-*

sioner v. *Glenshaw,* 348 U.S. 426 (1955), cited and quoted from by the court below for the proposition that gross income for federal income tax extends to accessions of wealth, this court in holding that punitive damages recovered in an antitrust suit represented gross income stated at page 431 that gross income under the federal income tax extends to "accessions to wealth, *clearly realized* and over which the taxpayers have complete dominion." (Emphasis supplied.)

In *Commissionr* v. *Wilcox,* 327 U.S. 404 (1946), cited by the court below, this court determined that embezzled funds were not income to the embezzler for federal income tax purposes, because there was an obligation by the embezzler to repay the embezzled funds. The following from this court's opinion at 407 disposes of any idea that this court was dispensing with the requirement of realization:

> The very essence of taxable income, as that concept is used in § 22(a), is the accrual of some gain, profit or benefit to the taxpayer. This requirement of gain, of course, must be read in its statutory context. Not every benefit received by a taxpayer from labor or investment necessarily renders him taxable. Nor is mere dominion over money or property decisive in all cases.

The lower court cited *Old Colony Trust Co.* v. *Commissioner,* 279 U.S. 716 (1929), and *Commissioner* v. *LoBue,* 351 U.S. 243 (1956), for the proposition that income comprehends accession to wealth in the form of economic benefit, value in money, or money's worth. There is nothing in these two decisions to suggest that economic benefit or value in money or money's worth "unrealized" is income. In *Old Colony Trust Co.,* this court determined that a payment to the taxpayer by his employer as reimbursement of his federal income taxes was compensation for services and thus by nature income for federal income tax purposes. The

compensation was realized by the taxpayer, since it was paid to him in cash. In *LoBue,* this court decided that the exercise of a stock option granted an employee in his employer's stock was income for federal income tax purposes. There was a "transaction", a transfer, in which the employee realized income. This court at page 247 said:

> When assets are transferred by an employer to an employee to secure better services, they are plainly compensation.

The lower court cited *Helvering* v. *Bruun,* 309 U.S. 461 (1940), for the principle that gain of the use and dominion of a valuable good or thing is income, that there is no requirement that it be sold or converted to cash. But the lower court failed to recognize that there must be a "transaction" between two or more persons or legal entities, and there must be "realization". Note the following from this court's opinion at 469:

> While it is true that economic gain is not always taxable as income it is settled that the realization of gain need not be in cash derived from the sale of an asset. Gain may occur as a result of exchange of property, payment of a taxpayer's indebtedness, relief from a liability, or other *profit realized from the completion of a transaction.* (Emphasis supplied.)

In *Bruun,* there was profit realized from the completion of a transaction, repossession of property by a landlord from a lessee. In the case of oil and gas production by petitioner at the Corpus Christi Naval Air Station, there was no "transaction" between another and petitioner by which petitioner "realized" a gain or profit. Petitioner did not have a "transaction" with another when it produced the oil and gas. Petitioner owned the right to reduce the oil and gas to possession before and after severance, there was no

"transaction" or "'realization" until the oil and gas was sold or products made from it were sold.

The landmark case decided by this court on whether there has been income for federal income tax purposes is *Eisner* v. *Macomber*, 252 U.S. 189 (1920). In holding that a dividend in stock was not income to the shareholder, this court said at 212:

> We are clear that not only does a stock dividend really take nothing from the property of the corporation and add nothing to that of the shareholder, but that the antecedent accumulation of profits evidenced thereby, while indicating that the shareholder is the richer because of an increase of his capital, at the same time shows he has not *realized or received any income in the transaction.* (Emphasis supplied.)

There were two parties in *Eisner* but no transfer of a valuable good or thing and of course no "realization" of income. The realization of income must await a transaction in which the shareholder sells his stock received as a dividend to a purchaser, two parties involved in a transfer of a valuable good or thing. In petitioner's case the realization of income must await the sale of the oil and gas produced.

Professor Roswell McGill clearly demonstrated the difference between economic income and income for federal income tax purposes in his book, TAXABLE INCOME (1945 ed.). At page 22, he states:

> [I]t appears that the major difference between the concept of income for tax purposes accepted by the United States Supreme Court and such economic concept as advanced by Haig lies in the legal requirement that the gain must be severed from capital; or in the terms of the decisions, *that the income must be realized.* (Emphasis supplied.)

An "economic concept" of income is not the same, at least in all instances, as the concept of income under federal law. Further at page 81, Professor McGill states:

> No income tax liability results from an unrealized appreciation in value of property, however great; it is possible for a man to grow richer year by year, with no corresponding income tax to pay.

The lower court erroneously cited Federal Income Tax Regulation § 1.61-14 in support of its holding that production of oil and gas at the Corpus Christi Naval Air Station resulted in income. Section 1.61-14 of the Regulations deals with miscellaneous items of income. It would seem to petitioner that Treasury Regulations § 1.61-3 is determinative when income is realized for federal income tax purposes in oil and gas production operations. Section 1.61-3 provides:

> In a manufacturing company, merchandising, or mining business, "gross income" means the total *sales*, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources. (Emphasis supplied.)

In a mining business or operation there must be a sale of the product mined or produced before there can be gross income for federal income tax purposes. The Texas oil and gas severance taxes are levied on the severance — there need not be a sale for those taxes to apply.

The Supreme Court of Texas in this case said that the Buck Act does not require that the tax "conform to the federal income tax". Certainly, the state tax need not conform in rates, deductions, exemptions or such matters. But equally certain, it is basic that the tax must apply to that which constitutes "income" under federal law. Under federal law accretion to wealth is not income — there must be gain "realized" as the result of a "transaction" between

two or more parties. There can be no "realization" or "transaction" when one is simply working internally in its own business and is not conducting transactions with others. Self-dealings do not generate "income" under federal law.

Petitioner submits that the Texas oil and gas severance taxes are not income taxes under the Buck Act and under Article I, Section 8, Clause 17, of the United States Constitution, the State of Texas is without power to levy and collect such taxes.

In this case, the court below has decided a Federal question of substance not theretofore determined by this court. Further, such Federal question is an important question of Federal law which should be settled by this court.

There are several of the oil and gas producing states that levy severance taxes based on the value of the oil and gas produced. The right of states to levy these taxes in areas of exclusive federal jurisdiction will diminish to a substantial degree the amount of bonus money received by the United States on the granting of future Federal oil and gas leases within these enclaves. Such taxes will also diminish the amount of royalty money eventually received by the Federal Government since the leases will reach the point of noncommercial production at an earlier time resulting in an earlier abandonment date.

For the above reasons, the issue in this case is an important one for the United States Government.

CONCLUSION

It is respectfully submitted that the decision of the court below is incorrect and that a writ of certiorari should issue in this case to review the matter and thereafter the judgment of the Supreme Court of Texas should be reversed.

Respectfully submitted,

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August 3, 1972

CERTIFICATE

I, WALTER B. MORGAN, attorney for petitioner herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day of August 1972, three copies of the foregoing petition for certiorari to the Supreme Court of the United States were served upon the attorneys for Respondents, the State of Texas, by mailing said copies postage paid to the Attorney General of Texas.

Walter B. Morgan

WALTER B. MORGAN
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Attorney for Petitioner

APPENDIX I

No. 160,984

126TH JUDICIAL DISTRICT COURT
OF TRAVIS COUNTY, TEXAS

HUMBLE OIL & REFINING COMPANY

v.

ROBERT S. CALVERT, COMPTROLLER OF
PUBLIC ACCOUNTS, JESSE JAMES,
STATE TREASURER, AND
CRAWFORD C. MARTIN, ATTORNEY GENERAL

JUDGMENT

On the 23rd day of April, 1970, the above entitled and numbered cause came on to be heard and came the Plaintiff and the Defendants, each represented by their attorneys of record, and all parties being before the Court, announced ready for trial, whereupon a jury having been waived, all matters of fact and of law were submitted to the Court. The Court, after having heard the evidence and argument of counsel, finds that the facts do not bring the State of Texas within the provisions of Sections 106 and 110 of Title 4, United States Code Annotated (commonly known as the Buck Act). To which ruling of the Court, Defendants in open court objected and hereby except. The Court further finds that the execution of the oil and gas lease by the United States Government to Humble Oil & Refining Company was a conveyance in fee of the minerals in place to Humble Oil & Refining Company and that thereafter the production of oil and gas from the premises covered

by the oil and gas lease is subject to the tax on producers of natural gas as provided by Chapter 3 of Title 122A, Taxation-General, the regulation pipe line tax as provided by Article 6032, Vernon's Civil Statutes, and the occupation tax on oil as provided by Chapter 4 of Title 122A, Taxation-General, Vernon's Civil Statutes. To which ruling of the Court, Plaintiff in open court objected and hereby excepts.

It is, therefore, ORDERED, ADJUDGED and DECREED by this Court that Plaintiff take nothing by reason of this suit, and that the costs of court be assessed against the Plaintiff, Humble Oil & Refining Co. To which judgment Plaintiff then and there in open court excepted and gave notice of appeal to the Third Supreme Judicial District Court of Civil Appeals at Austin.

Signed and entered this 6th day of May, 1970.

/s/ TOM BLACKWELL
Judge Presiding

APPENDIX II

No. 11791

COURT OF CIVIL APPEALS
THIRD SUPREME JUDICIAL DISTRICT,
AT AUSTIN

HUMBLE OIL & REFINING COMPANY,
Appellant,

v.

ROBERT S. CALVERT
COMPTROLLER OF PUBLIC ACCOUNTS, ET AL
Appellees.

OPINION OF COURT

Plaintiff below, Appellant here, Humble Oil & Refining Company, paid the State of Texas, under protest, certain sums asserted by the State to be due it under Tex. Rev. Civ. Stat. Ann. art. 6032, Chapters 3 and 4, Title 122A, as a result of production by Humble of oil and gas from the Corpus Christi Naval Air Station lease. Humble brought this suit in accordance with Tex. Tax.-Gen. Ann. art. 1.05, Title 122A and art. 7057b, to recover such sums with interest earned thereon as provided by law.

At the time of the execution by the United States of the oil and gas lease to Humble in 1962, the Corpus Christi Naval Air Station was owned in fee by the United States and the area included within such station was a federal enclave with exclusive jurisdiction in the United States except for the right reserved by the State of Texas to serve process.

The trial court, sitting without a jury, entered judgment that Appellant take nothing by its suit.

The judgment of the trial court is reformed and as reformed, affirmed.

I.

Appellant is before us with eleven points of error;[1] however, inasmuch as we sustain its first, it will not be necessary to discuss the remaining points. Appellant's first point, which we sustain, is the error of the trial court in holding that the production of oil and gas from the premises covered by the oil and gas lease, an area of exclusive federal jurisdiction, was subject to the taxes provided for by Chapters 3 and 4 of Title 122A, Taxation-General, and

[1] "SECOND POINT: The trial court erred in holding that the State of Texas had jurisdiction to levy and collect the taxes involved in this cause; THIRD POINT: The trial court erred in holding that the oil and gas lease coupled with language in the deed of cession caused jurisdiction to revest in the State of Texas to levy and collect the taxes involved in this suit; FOURTH POINT: The trial court erred, regardless of the nature of the rights, estate, interest or privileges vested in Plaintiff (Appellant) by virtue of the oil and gas lease, in holding there was jurisdiction in the State of Texas, from termination of federal jurisdiction, reservation of jurisdiction, or otherwise, to levy and collect the taxes involved in this suit; FIFTH POINT: The trial court erred in holding that the oil and gas lease was a conveyance in fee of the minerals in place to Plaintiff (Appellant); SIXTH POINT: The trial court erred in failing to hold that the question of federal jurisdiction is a federal question governed by independent rule of decision, or federal common law, and not by the law of the State of Texas; SEVENTH POINT: The trial court erred in failing to apply an independent rule of decision, or federal common law, which in this case would have been the rule of HUMBLE PIPE LINE v. WAGGONER and MISSISSIPPI RIVER FUEL CORP. v. COCREHAM; EIGHTH POINT: The trial court erred in holding that there was jurisdiction in the State of Texas to levy and collect the occupation taxes involved in this suit; NINTH POINT: The trial court erred in

Tex. Rev. Civ. Stat. Ann. art. 6032, erring separately as to each such tax and collectively as to all such taxes.

The Corpus Christi Naval Air Station was acquired for the purpose of construction and operation of a naval air training station and it has been devoted to such use at all times since its acquisition. The State of Texas ceded exclusive jurisdiction to the United States by deed of cession dated December 12, 1940 and was accepted by the United States February 3, 1941. The deed of cession reserved concurrent jurisdiction only to the extent that all process, civil or criminal, issuing under the authority of the State of Texas or any of the courts or judicial officers thereof, might be executed by the proper officers of the State.

We hold that this point is controlled by the decision of the United States Supreme Court in Humble Pipe Line Co. v. Waggoner, 376 U.S. 369, 84 S.Ct. 857, 11 L.Ed. (2d) 782 and by the decision of the U.S. Court of Appeals, 5th Circuit, Mississippi River Fuel Corporation v. Cocreham, 382 F.2d 929 (1967), cert. denied 390 U.S. 1014, 20 L.Ed. (2d) 164. The question before the court in Waggoner was whether the United States has such exclusive jurisdiction over a large tract of land in Louisiana on which the Barksdale Air Force Base is located that Louisiana was without jurisdiction to levy an ad valorem tax on privately owned property

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enforcing State of Texas legislative jurisdiction in an area of exclusive federal jurisdiction, thereby conflicting with and failing to give effect to Article 1, Section 8, Clause 17, of The Constitution of The United States; TENTH POINT: The trial court, having correctly held that the taxes involved were not within Sections 106 and 110 of Title 4, United States Code Annotated (The Buck Act), erred in entering judgment that plaintiff (Appellant) take nothing by its suit and ELEVENTH POINT: The trial court erred in failing to render judgment for Plaintiff (Appellant) in the sum of $92,788.42, the sum of such taxes paid under protest, together with interest earned thereon."

situated on the tract. The court denied the state the right to tax the property in the federal enclave "for here the Government continues to hold all the land subject to its primary jurisdiction and control." In *Mississippi River Fuel* the court held that the State of Louisiana could not extract severance taxes on oil and gas produced by the lessee, a private corporation, under mineral lease from the United States on land that was part of Barksdale Air Force Base which had been acquired by the United States from the State of Louisiana. Here the court restated the principle announced in *Waggoner,* that the state lacks authority to levy *any* tax in an area under the exclusive jurisdiction of the United States.

The State's position in this case is that the execution of the oil and gas lease by the United States Government was a conveyance in fee of the mineral estate in place and constituted an abandonment of exclusive political jurisdiction by the U.S. Government as to the minerals included in the oil and gas lease; that the production of oil and gas produced by Humble was subject to the occupation tax levied by Chapters 3 and 4 of Title 122A, Taxation-General, regardless of whether the question of jurisdiction is controlled by Federal or State law.

In support of this position, the State has cited S.R.A. Inc. v. Minnesota, 327 U.S. 558, 90 L.Ed. 851, 66 S. Ct. 749 (1945), where the State of Minnesota was allowed to tax realty within the boundaries of that State while the legal title remained in the United States. *S.R.A.* involves a fact situation different from that before us. There the Federal Government had conveyed away the entire fee to the territory over which it previously had exclusive jurisdiction, although retaining legal title as security for payment of the purchase price. In the case at bar, the Federal Government continues to own the fee in the Corpus Christi Naval

Air Station, subject only to the lease, and continues to use it for the constitutional purpose. Consequently, its exclusive jurisdiction continues over the territory. The United States Supreme Court recognized this distinction in *Waggoner*. The Court also stated in *Waggoner* that it is by no means sure that a federal agency making an oil and gas lease could waive the Government's exclusive jurisdiction over a federal reservation. Here the Court was making reference to the division of powers between the branches of the United States Government and to the principle that since exclusive jurisdiction is legislative, only Congress has the power to relinquish such exclusive jurisdiction. This same distinction applies to the *Baltimore Shipbuilding*[2] case cited by appellee.

Nor is *Group No. 1 Oil Corporation*,[3] urged by the State, controlling here. The United States Supreme Court held in that case that the owner of an oil and gas lease on land owned by the State of Texas, and the owner's income from such lease, were not immune from federal taxation. Perhaps this case can be distinguished on the theory of immunity from taxation, or lack thereof, as opposed to the jurisdiction of the federal government over an active enclave, perhaps not. In any event, this decision of 1930 in no way alters the mandate of the Federal Courts in *Waggoner*, or *Cocreham*. In the latter the Court states:

> "While there are differences between the taxes involved, we think that *Humble* did not rest on the peculiar attributes of the ad valorem tax. It rested instead on the general principle that a state lacks authority to levy any tax in an area under the exclusive jurisdiction of the United States."

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[2] Baltimore Shipbuilding & Dry Dock Company v. Baltimore, 195 U.S. 375, 49 L.Ed. 242, 25 S.Ct. 50 (1904).

[3] Group No. 1 Oil Corporation v. Bass, 283 U.S. 279, 75 L.Ed. 1032, 51 S.Ct. 432 (1930).

In the former:

> "When Congress has wished to allow a state to exercise jurisdiction to levy certain taxes within a federal enclave it has specifically so stated, as in the Buck Act, 4 USC secs. 104-110."

Also see Adams v. Calvert, 396 S.W.2d 948 (Tex. 1965).

II.

The deed of cession also contains the following provision:

> "This deed of Cession is made pursuant to Articles 5242, 5247 and 5248 of the Revised Civil Statutes of Texas, 1925, and in accordance therewith the United States of America shall be secure in its possession and enjoyment of all said lands, and said lands and all improvements thereon shall be exempt from any taxation under the authority of the state of Texas, so long as the same are held, owned, used, and occupied by the United States of America for any of the purposes expressed in the foregoing statutes and not otherwise."

The State contends that the above-mentioned statutes enumerated in the deed constitute a reservation that the United States shall be secure in its possession and enjoyment of all said lands and shall be exempt from any taxation from the State so long as they are "held, owned, used, and occupied by the United States of America for any of the purposes expressed in the foregoing statutes and not otherwise." That when the United States sold and conveyed the mineral lease involved in this land to Humble that the mineral estate was no longer being "held, owned, used, etc." That, consequently, the sale of the minerals was a relinquishment and abandonment by the United States of exclusive political jurisdiction formerly exercised over this property.

We do not agree. Article 5242 gives legislative permission to the United States to acquire "lands" within Texas for specified purposes including the constitutional purposes of Article 1, Section 8, clause 17. Article 5247 authorizes the cession of exclusive jurisdiction save for the service of process. The third reference is to Article 5248 as it existed at the date of cession which is, with the exception of the reference to the three statutes, incorporated, almost word for word, in the deed of cession as set out above.

There is nothing in the reference to Articles 5242 and 5247 which in any way limit the grant of jurisdiction for they authorize the cession in terms limited only with relation to service of process. Nor does Article 5248, as it existed at the time (before the "provisos" added in 1950) reserve taxing power.

Federal law permits a state to reserve in its deed of cession all jurisdiction consistent with the constitutional federal use, but no more. However, the reservation by the state, whether by statute or reservation, must be clear. See Surplus Trading Co. v. Cook, 281 U.S. 647, 50 S.Ct. 455, 74 L.Ed. 1091 (1929), where the Court said:

> "The words are ill adapted to expressing such a purpose — so much so that, had it existed, there can be little doubt that it would have been stated differently."

This statement was quoted with approval by the Texas Supreme Court in Adams v. Calvert, above. We hold that the statutes incorporated in the deed of cession did not reserve to the State the power claimed.

III.

The State is also before us with four cross-points of error which we shall discuss together. They are error of

the trial court in holding that the gross production taxes levied in Tex. Rev. Civ. Stat. Ann. art. 4.01, Title 122A, Taxation-General, are not "income taxes" within the meaning of that term in the Buck Act, 4 U.S.C.A., Secs. 105-110; in holding that the gross production tax levied in Tex. Rev. Civ. Stat. Ann. art. 4.01, Title 122A, Taxation-General, are not taxes related to or measured by the gross receipts, or gross income of the production operations considered separately from other activities of the producer; in holding that the gross production taxes levied in Tex. Rev. Civ. Stat. Ann. art. 3.01, Title 122A, Taxation-General, are not "income taxes" within the meaning of that term in the Buck Act, 4 U.S.C.A., Secs. 105-110; in holding that the gross production tax lexied in Tex. Rev. Civ. Stat. Ann. art. 3.01, Title 122A, Taxation-General, are not taxes related to or measured by the gross receipts, or gross income of the production operations considered separately from other activities of the producer.

We sustain these points.

The Texas oil severance tax, Tex. Rev. Civ. Stat. Ann. art. 4.02, Title 122A, provides for a tax of 4.6 cents ber barrel of oil produced with the further proviso that whenever a barrel of oil has a market value in excess of $1.00, the tax shall be 4.6 percent of the market value of the oil.

The Texas gas severance tax, Tex. Rev. Civ. Stat. Ann. art. 3.01, Title 122A, Taxation-General, provides for a tax equal to 7½ percent of the market value of the gas produced and saved, provided, however, that the amount of the tax on sweet and sour gas shall never be less than 121/1500 of one cent (1¢) per one thousand (1,000) cubic feet. When gas has a market value of less than 1.076 per Mcf. the tax will be 121/1500 of one cent per Mcf. If the gas has a market value in excess of 1.076 cents per Mcf.,

the tax will be 121/1500 of one cent plus 7½ percent of an additional sum. Under some operating and marketing conditions, the additional sum will be the excess of market value of the gas over 1.076 cents per Mcf. Under other operating and marketing conditions, the additional sum will be the excess of a statutory fictional taxable value computed under various arbitrary formulae. Consequently, when the gas has a market value of less than the minimum, the tax is measured only by units of volume.

The Buck Act defines "income tax" as "any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts." 4 U.S.C.A. Sec. 110(c).

Appellant maintains that inasmuch as in both the tax on oil and gas that the tax is measured by units of volume, that the tax is not a Buck Act tax and cite *Mississippi River Fuel* as authority for this contention.

We do not agree. Every tax on the "value" of any commodity must of necessity be measured by some type of unit whether it be barrels, cubic feet or dollars. We agree with the State's contention that the taxes here are measured on the value of the oil and gas in each instance, whatever the formula and that the purpose of the tax is to secure revenue for the State. By calling the tax an occupation tax or a severance tax, or whatever else, begs the question. The purpose of the tax is to bring "income" to the State for revenue purposes.

This line of reasoning was followed by the Supreme Court of the State of Washington in Alaska v. Baker, 390 P.2d 1009, 64 Wash. 2d 207 (1964). The appeal was dismissed by the United States Supreme Court in 85 S.Ct. 952, 380 U.S. 260, 13 L.Ed. 2d 959. The facts there, somewhat similar to those at bar, are not too important here. The importance of this decision is the manner in which the Court, for the

purpose of the Buck Act, divided taxes into those intended to bring in revenue, and those enacted under the police power of the State such as licensing fees. Thus, irrespective of what the tax is called, if its purpose is to produce revenue, it is an income or a receipts tax under the Buck Act. The tax at bar is a reveune measure thus it falls within the Act.

The State has not assigned error to the Trial Court's determination that the Regulation Pipeline Tax, Article 6032, is not within the scope of the Buck Act, consequently we reform the Trial Court's judgment to allow appellant to recover the sum of the Regulation Pipeline Tax payments in issue together with interest earned thereon. In all other things the judgment of the Trial Court is affirmed.

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John C. Phillips, Chief Justice

Reformed and as
Reformed, Affirmed

Filed: February 10, 1971

APPENDIX III

No. B-2685

SUPREME COURT OF TEXAS

HUMBLE OIL & REFINING COMPANY,
Petitioner,

v.

ROBERT S. CALVERT, ET AL,
Respondents.

OPINION OF COURT

Humble Oil & Refining Company instituted this action to recover "occupation taxes" and the Regulation Pipeline Tax paid to the State under protest. The taxes arose out of Humble's operations in the federally owned Corpus Christi Naval Air Station enclave.

The two main problems are (1) whether by executing an oil and gas lease, the United States abandoned its exclusive jurisdiction over the mineral estate in the enclave, and (2) whether, assuming that it had not abandoned its jurisdiction, the United States consented to the State's taxation by enacting what is known as the Buck Act.

The trial court, sitting without a jury, held that the United States had abandoned its jurisdiction of the mineral estate, and thus receded to the State jurisdiction and the power to tax. Hence it held that Humble could not recover any of the taxes paid. The Court of Civil Appeals disagreed, as we do, that there had been an abandonment by the United States. But it further held that the Congress, by

the Buck Act, had consented to the State taxation. The Court of Civil Appeals affirmed that part of the trial court's judgment denying Humble a recovery for its "occupation" taxes; and it reformed the trial court's judgment to allow a recovery of the Regulation Pipeline Tax. 464 S.W. 2d 170. The State does not contend that the Regulation Pipeline Tax is a Buck Act income tax, and we do not regard that tax as being before us. We therefore affirm the judgment of the Court of Civil Appeals.

After giving the background of the case, we will first give our reasons for holding that there was no abandonment or recession of the mineral estate by the United States, and then discuss the Buck Act.[1] That Act permits the States to levy certain taxes, including "income taxes"; but then it defines "income taxes" as "any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts." While our statute is generally called an "occupation tax," it is our opinion that the tax essentially falls within the definition of "income tax" in the Buck Act.

THE BACKGROUND

In 1940, the United States condemned approximately 2000 acres for use as a Naval Air Station and was awarded fee simple ownership. Later in the same year, pursuant to Article 1, Sec. 8, Clause 17 of the United States Constitution, the Governor of Texas [O'Daniel] ceded exclusive jurisdiction over the condemned land to the United States government. The State retained only the power to serve process in the enclave.

In 1962, in order to prevent drainage by peripheral drilling, Humble was awarded a "Protective Oil and Gas Lease."

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[1] 4 U.S.C.A. §§ 105-110, 54 Stat. 1959 (1940).

A 1/6 royalty was retained by the federal government. Humble was successful in its drilling, and it now seeks to recover the oil and gas occupation taxes and the Regulation Pipeline Tax paid under protest to the State.

1. The Question of Recession to the State

The Texas act of cession granted exclusive jurisdiction to the United States "as long as the same [land] remains the property of the United States. . . ." It also provided that the lands should be exempt from State taxation "so long as the same are held, owned, used and occupied . . . for any of the purposes expressed in the foregoing statutes and not otherwise."

The argument is that in Texas, an oil and gas lease is not really a "lease" but is the conveyance of a determinable fee in the minerals; that by granting the fee to the minerals to Humble, the United States effected a severance of the mineral estate just as if it had executed a deed in fee simple to the west one-half of the surface; and that, therefore, the mineral estate was no longer owned by the United States, and it certainly was not used for the purpose of operating a naval air station. So, the argument is, the United States no longer owns this part of the enclave, has abandoned its exclusive jurisdiction over it and thus receded the power to tax the minerals to the State.

There are ample Texas cases to support the State's contention that under Texas law, an oil and gas lease does convey a determinable fee simple estate. The opinion of the Court of Civil Appeals discusses several cases which would distinguish this case from the usual Texas rules on the effect of the execution of an oil and gas lease in Texas.

We think that the simplest reason for disagreeing with the State in this case is that when the State ceded lands to

the United States, it is federal law which is determinative of the effect of the execution by the United States of an oil and gas "lease."

This principle was recognized in *S.R.A. Inc.* v. *Minnesota*, 327 U.S. 558 (1946). There lands were ceded for use as a U. S. post office. The building was later vacated. The land and the building were "sold" by the United States to S.R.A., but the United States retained legal title, as a mortgage or security interest, to insure payment in full. The State of Minnesota then sought to tax the land on the idea that the United States had abandoned its jurisdiction. The question before the court was whether federal or Minnesota law would determine the effect of this type conveyance. It was held by the Supreme Court of the United States that, "In determining the meaning and effect of contracts to which the United States is a party, the governing rules of law must be finally declared by this Court." The holding was that since under federal law the executory contract of sale left only a security interest in the federal government, this sale passed enough interest to the grantee to trigger an abandonment of federal jurisdiction. Thus in our case, federal law will declare the effect to be given an oil and gas lease. The execution of an oil and gas lease by the federal government does not constitute a relinquishment of federal jurisdiction. In this regard, see *Humble Pipe Line Co.* v. *Waggonner*, 376 U.S. 369 (1964), where Mr. Justice Black, writing for a unanimous court, concluded with the warning that "[w]hen Congress has wished to allow a State to exercise jurisdiction to levy certain taxes within a federal enclave it has specifically so stated, as in the Buck Act. . . ." 376 U.S. at 374.

We therefore disagree with the State on its first ground.

2. The Buck Act

The second contention of the State is that by operation of the Buck Act, the taxes are sanctioned. The Buck Act was enacted by the Congress in 1940 to enable the states to impose certain taxes including "income taxes" within federal enclaves. "Income tax" is defined very broadly to mean "*any* tax levied on, with respect to, or measured by, net income, gross income, or gross receipts." (emphasis added).

The Congressional intent is strongly stated in the bill's Senate Report[2] where it is stated that "[t]his definition [of income tax] . . . must of necessity cover a broad field because of the great variations to be found between the different State laws. The intent of your committee in laying down such a broad definition was to include therein any State tax (whether known as a corporate-franchise tax, or business-privilege tax, or any other name) if it is levied on, with respect to, or measured by, net income, gross income, or gross receipts."

We are here dealing with a particular statutory definition of an "income tax" in a particular context, and not with any sort of common understanding of an "income tax." "Income taxes," or taxes on income, describe a generic class of taxes in which the base or measure is income. "Income" is variously described as the flow of goods, services, property or other wealth during a definite period of time. It may be considered as the money, or money's worth, which comes during a definite period. It is to be distinguished from capital, which is a fund of wealth at a particular time. See

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[2] Report of the Senate Finance Committee of May 16, 1940, at page 5; 76th Congress, 3rd Session; Report No. 1625, Calendar No. 1692, which was introduced in evidence in this case. The report also states that "The definition of income tax is broad enough to include a sales tax which is measured by gross receipts from sales." *Id.* at page 3.

SELIGMAN, INCOME TAX, 7 Encyclopedia of the Social Sciences 628-631 (1932). The essence of income is an inflow constituting an accretion to wealth, identifiable and measurable in money or money's worth, though not necessarily in cash.

A particular "income tax" may, of course, define its base more narrowly and selectively than the broadest definition of income. A particular income tax may select different points in time at which the income will be recognized, such as the time of sale, time of receipt, time of manufacture or production, et cetera. Whatever these differences, however, the tax does not cease to be an income tax.

The greatest body of authority with respect to income taxes is to be found in the statutes, regulations, cases and other authorities relating to the United States federal income tax, Internal Revenue Code of 1954, Title 26, United States Code. For purposes of the federal income tax, the Supreme Court of the United States has rejected the effort to develop a single comprehensive definition of income, stating that "no single, conclusive criterion has yet been found to determine in all situations what is sufficient gain to support the imposition of an income tax." *Commissioner* v. *Wilcox,* 327 U.S. 404, 407 (1946). Nevertheless, that court has amply demonstrated what is to be regarded as income under the federal income tax and, therefore, what may be regarded as properly includable within an income tax. Gross income under the federal income tax extends to "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Commissioner* v. *Glenshaw Glass Co.,* 348 U.S. 426, 431 (1955). A tax, then, levied upon and measured by an accession to wealth and over which the taxpayer has dominion may properly be regarded as an income tax.

It is clear that income, to be subjected to the tax under the federal income tax, need not be received in the form of cash or even readily exchangeable value. Rather, income comprehends an accession to wealth in the form of economic benefit, value in money, or money's worth. *Old Colony Trust Company* v. *Commissioner*, 279 U.S. 716 (1929); *Commissioner* v. *LoBue*, 351 U.S. 243 (1956).

Gain of the use and dominion of a valuable good or thing is income; there is no requirement that it be sold or converted to cash. In *Helvering* v. *Brunn*, 309 U.S. 461 (1940), the Supreme Court held that a landlord-taxpayer who had come into possession and full ownership of a building erected upon his land by a lessee who had forfeited the lease and caused a reversion to the lessor was in receipt of "income." The taxpayer had claimed that "[s]uch added value [to his land] . . . can be considered . . . gain only upon the owner's *disposition* of the asset." The Court instead stated that ". . . we think that gain . . . was realized by [the taxpayer] in the year of *repossession*." *Id.* at 467, 468. (Emphasis added). And the Income Tax Regulations § 1.61-14 make it clear that no transfer or sale of a valuable thing is necessary.

The Buck Act "income tax," broadly defined as it is, refers to the broad generic class of taxes upon income. It does not require that the tax be denominated an income tax or that it conform to the federal income tax. If the tax in question is based upon income and is measured by that income in money or money's worth, as a net income tax, gross income tax, or gross receipts tax, it is an "income tax."

The State of Texas by Article 3.01-3.11, Title 122A, Taxation-General,[3] imposes an "occupation tax on the business or occupation of producing gas within this State." The tax is

[3] Codified in 20A Vernon's Annotated Texas Statutes, Tax.-Gen. Art. 3.01. Other tax statutes herein are similarly codified and bear the same article number.

computed on the market value of the gas as and when produced. Market value is defined as the cash price received by the producer when sold at the wellhead. If the gas is not sold, it is assigned the value at which it could have been sold. There is provided a minimum tax rate per unit of volume which has the effect of putting a floor under the value of the gas for tax computation purposes. All of the gas taxes involved in this case were computed on a value in excess of the floor value; so the alternate computation method is not here involved.

Articles 4.01-4.14 impose an occupation tax on oil produced within this State. The tax is measured by a percentage of the value of all oil produced or salvaged. Again, there is provided a minimum tax rate per unit of volume which has the effect of putting a floor under the value of the oil for tax computation purposes. All of the oil taxes involved in this case were computed on a value in excess of the floor value; so the alternate computation method is not here involved.

The fact that the Texas taxes on oil and gas production are denominated as "occupation taxes" and not "income taxes" is not determinative of this case. An occupation tax, if measured by receipts or income, is an income tax within the meaning of the Buck Act. *Howard* v. *Commissioners of the Sinking Fund of the City of Louisville*, 344 U.S. 624 (1953), involved the Buck Act and State taxation within a federal enclave in a portion of Louisville. The State, after the cession of the area, sought to collect a state tax which was denominated by statute as a "license fee." The Court of Appeals of Kentucky had already held that the tax was *not* to be an "income tax" but a tax upon the privilege of working within the City of Louisville.[4] Over the dissent of Jus-

[4] City of Louisville v. Sebree, 308 Ky. 420, 214 S.W.2d 248 (1948). The city was not authorized to levy an income tax, and this city "license fee" or "occupation tax" was held to be valid as not being an income tax.

tices Douglas and Black, the Court held that it did not matter that the tax involved was not an "income tax" by Kentucky law. It emphasized that the Buck Act definition applied to *any* tax, and the word "any" was italicized in the Court's opinion. If *any* tax came within the Buck Act's *definition* of income tax, it was permissible to the State. Since the tax there involved was measured by, and levied with respect to, the income from the taxed activity, it was a Buck Act income tax even though not denominated or classified as an income tax under local law.

The dissenters in *Howard* emphasized that the Louisville tax was not [specifically] a tax on "net income, gross income, or gross receipts" as defined in the Buck Act. The Louisville tax was measured by a percentage of earned income only. As Justice Douglas wrote, "The tax is narrowly confined to salaries, wages, commissions and to net profits of business. . . . Many kinds of income are excluded, e.g., dividends, interest, capital gains. The exclusions emphasize that the tax is on the *privilege* of working or doing business in Louisville." 344 U.S. at 629. The majority adopted the broader view in the light of the apparent purpose of Congress.

Further, it is not controlling that the Texas taxes on oil production and on gas production reach only certain items of income and do not constitute taxes on all income. Buck Act income taxes need not be general income taxes, but may be selective income taxes as was true in *Howard* v. *Commissioners* discussed above. The legislative history supports this conclusion by reading into the term income tax a business-privilege, a tax much more limited in scope than a general income tax.

The Texas oil production and gas production taxes attach when these minerals have been produced and severed from the earth, when they have been reduced to possession and

have come within the dominion and control of the producer. At that point there has been an inflow of wealth, an accretion to wealth, an economic gain in money or money's worth. The tax, as applied in this case, is levied on and measured by the value in money or money's worth of the minerals, whether they be sold, used, or otherwise disposed of. The tax attaches upon the receipt and is measured by the gross value of that received. This is the essence of an income tax.

Though not necessary to our decision herein, it is interesting to note that, in connection with the federal income tax, producers of oil and gas are allowed a deduction for depletion of the capital reservoir of minerals. The deduction is expressed as a percentage of the "gross income from the property." Internal Revenue Code of 1954, § 613. Gross income from the property is defined in the Income Tax Regulations, § 1.613-3, as follows:

> "In the case of oil and gas wells, 'gross income from the property' as used in section 613 (c)(1), means the amount for which the taxpayer sells the oil or gas in the immediate vicinity of the well. If the oil or gas is not sold on the premises but is manufactured or converted into a refined product prior to sale, or is transported from the premises prior to sale, the gross income from the property shall be assumed to be equivalent to the representative market or field price of the oil or gas before conversion or transportation."

In the case before us, the gross income from the property with respect to the Corpus Christi Naval Air Station lease reported by Humble for federal income tax depletion purposes is the same, to the dollar, as the market value of produced oil and gas from those leases reported by Humble for Texas occupation tax purposes. It is recognized that the gross income from the property is used only for depletion computation purposes and not for the purpose of deter-

mining gross income under the federal tax, but the concept is too close to the income tax for us to conclude that it falls outside the broad ambit of an income tax contemplated in the Buck Act.

As above noted, this case originally involved also the State's attempt to tax under the Regulation Pipeline Tax. The State has not brought this point forward, and apparently concedes that the Regulation Pipeline Tax is not exempt as a Buck Act tax under the authority of *Mississippi Fuel Corp.* v. *Cocreham,* 382 F.2d 929 (5th Cir. 1969). Therefore we express no holding with respect to that case. Suffice it to say here, we regard *Cocreham* as distinguishable here because the Louisiana tax there involved was only on quantity of mineral severed.

The judgment of the Court of Civil Appeals is affirmed.

Joe Greenhill
Associate Justice

Opinion delivered: March 29, 1972.

No. B-2685

SUPREME COURT OF TEXAS

HUMBLE OIL & REFINING COMPANY,
Petitioner,

v.

ROBERT S. CALVERT, ET AL,
Respondents.

Petitioner's motion for rehearing, filed in the above numbered and entitled cause on April 11, 1972, having been duly considered, it is ordered that said motion be, and hereby is overruled.

May 10, 1972

APPENDIX IV

Title 122A, Taxation-General, Vernon's Texas Civil Statutes

Art. 3.02 Market Value

(1) The market value of gas produced in this State shall be the value thereof at the mouth of the well; however, in case gas is sold for cash only, the tax shall be computed on the producer's gross cash receipts. Payments made by purchasers to producers for the purpose of reimbursing such producers for taxes due hereunder shall not be considered a part of the producer's gross cash receipts. In all cases where the whole or a part of the consideration for the sale of gas is a portion of the products extracted from the producer's gas or a portion of the residue gas, or both, the tax shall be computed on the gross value of all things of value received by the producer, including any bonus or premium; provided that notwithstanding any other provision herein to the contrary, where gas is processed for its liquid hydrocarbon content and the residue gas is returned by cycling methods, as distinguished from repressuring or pressure maintenance methods, to some gas producing formation, the taxable value of such gas shall be three-fifths (3/5) of the gross value of all liquids extracted, separated and saved from such gas, such value to be determined upon separation and extraction and prior to absorption, refining or processing of such hydrocarbons and such value prior to refining shall be the value of the highest posted price of crude oil in the field where said gas is produced or in the nearest oil field in the event no oil is produced in said field and the quantity of the products shall be measured by the total yield of the processing plant from such gas.

(2) All condensate recovered from gas shall be taxed at the same rate as oil and shall be valued for the purpose

of computing the tax due thereon at the prevailing market price for condensate in the general area where the same is recovered. The term "condensate" shall include all liquid hydrocarbons that are or can be recovered from gas by means of a separator but shall not include any liquid hydrocarbons which can only be recovered from gas by refrigeration or absorption and separated by a fractionating process.

Where additional liquid hydrocarbons other than condensate are recovered from gas the taxable value of such additional liquid hydrocarbons shall be determined by deducting from the total receipts of the producer for all liquid hydrocarbons recovered from his gas the taxable value assigned to the condensate and the applicable rate set forth in sub-section (1) of Article 3.01 shall be applied to the difference to determine the tax due hereunder on such additional liquid hydrocarbons.

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes and Provisions Involved	2
Statement	4
Argument	5
Conclusion	20
Prayer	21
Appendix	
I. Buck Act, Sections 104-110(c) of Title 4, U.S.C.	23
II. Sections 351, 352 and 357 of Title 30, U.S.C., Mineral Leasing Act for Acquired Lands, 30 U.S.C.	27

TABLE OF AUTHORITIES

CASES: Page

Alexander v. *King*, 46 F.2d 235 (10th Cir. 1931) 74 A.L.R. 174 14

Anderson v. *Helvering*, 310 U.S. 404 (1940) 5

Commissioner v. *LoBue*, 351 U.S. 243 (1956) 12

Commissioner v. *Wilcox*, 327 U.S. 404, 407 (1946) 12

Forbes v. *Thomas Gracy Consolidated Virginia Mining Co.*, (1877), 94 U.S. 313, (Nevada) 10

Helvering v. *Brunn*, 309 U.S. 461 (1940) 12

Howard v. *Commissioners of the Sinking Fund of the City of Louisville*, 344 U.S. 624 (1953) 6

Humble v. *Waggoner*, (1964) 376 U.S. 369 18

Jaffke v. *Dunham*, 352 U.S. 280, 281 15

Klies v. *Linnane*, (1945), 156 P.2d. 183, 117 Mont. 59 ... 10

Langres v. *Green*, 282 U.S. 351 15

Magnolia Petroleum Co. v. *Oklahoma Tax Commission*, 121 P.2d. 1008 (1941) 10

Mid-Northern v. *Walker*, 268 U.S. 45 (1925) 5, 19

Missouri K. & T. Ry. Co. v. *Meyers*, 204 F.2d 140 (1913), (Oklahoma) 10

New Creek Co. v. *Lederer*, 295 Fed. 433, (3rd Cir. 1924), cert.den. 265 U.S. 581, 44 S.Ct. 456, 68 L.Ed. 1190 15

Old Colony Trust Company v. *Commissioner*, 279 U.S. 716 (1929) 12

Palmer v. *Barrett*, 162 U.S. 399 (1895) 17

TABLE OF AUTHORITIES—Continued

	Page
Stanton v. *Baltic Mining Co.*, 240 U.S. 103 (1916)	13, 14, 15
State v. *Humphrey*, 159 S.W.2d 162 (Tex.Civ.App. 1941, no writ)	7, 8
Stratton's Independence v. *Howbert*, 231 U.S. 399 (1913)	13, 14
Texas Company v. *W. A. Cooper*, 107 So.2d 676 (1958)	10
United States Smelting, Refining & Mining Co. v. *Haynes*, 176 P.2d 622 (1947) (Utah)	10
Walling v. *General Industries Co.*, 330 U.S. 545	15
UNITED STATES CONSTITUTION	
Art. 4, § 3, cl. 2	20, 21
UNITED STATES STATUTES	
4 U.S.C., §§ 104-110 (The Buck Act)	4, 6
4 U.S.C., §§ 105 & 110(b)	10
4 U.S.C., §§ 106 & 110(c)	2
4 U.S.C., § 110(c)	6, 9
26 U.S.C., § 613	4, 5, 8
28 U.S.C., 1257(3)	1
30 U.S.C., §§ 181	5, 19
30 U.S.C., § 189	5
30 U.S.C., § 351	4, 19
30 U.S.C., § 352	4, 19, 20
30 U.S.C., § 357	4, 19

Page

TEXAS STATUTES

20A Vernon's Texas Civil Statutes

Chapter 3, Title 122A, Taxation-General 2

Article 3.01, Title 122A, Taxation-General 2

Article 3.02, Title 122A, Taxation-General 3

Chapter 4, Title 122A, Taxation-General 2

Article 4.02, Title 122A, Taxation-General 3

15A Vernon's Texas Civil Statutes

Article 5242 16

Article 5247 16

Article 5248 16

OTHER

House Report No. 550, 80th Cong., 1st Sess. (1947), U.S.Cong. & Adm. News 19

Income Tax Regulations, § 1.613 11

Seligman, Income Tax, 7 Encyclopedia of the Social Sciences 628-631 (1932) 13

Senate Report No. 1625 6

NO. 72-191

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

HUMBLE OIL & REFINING COMPANY,
Petitioner

v.

ROBERT S. CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS, JESSE JAMES, STATE TREASURER, AND CRAWFORD MARTIN, ATTORNEY GENERAL, OFFICIALS OF THE STATE OF TEXAS,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Texas Court of Civil Appeals for the Third Supreme Judicial District of Texas (Pet.App. 24-33) is reported at 464 S.W.2d 170. The opinion of the Texas Supreme Court (Pet.App. 34-44) is reported at 478 S.W.2d 926.

JURISDICTION

The judgment of the Texas Supreme Court was entered on March 29, 1972, and timely Motion for Rehearing was denied by said Court on May 10, 1972. The petition for a Writ of certiorari was filed on August 3, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). Respondents do not concede that jurisdiction exists.

QUESTION PRESENTED

The question presented is whether the Texas oil and gas production business privilege taxes[1] arising from Petitioner's production business activities carried on within the Corpus Christi Naval Air Station, a federal enclave over which the State of Texas granted exclusive jurisdiction, are "income taxes" within the meaning of the Buck Act[2] and thus, may be levied on the production activities of Petitioner.

STATUTES AND PROVISIONS INVOLVED

The Buck Act provides:

4 U.S.C., § 106:

> "(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area."

4 U.S.C. § 110:

> "(c) The term 'income tax' means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts."

The Texas statutes provide:

20A Vernon's Texas Civil Statutes, Taxation-General, Article 3.01:

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[1] Chapter 4 (with respect to oil) and Chapter 3 (with respect to gas), Title 122A, Taxation-General, Vernon's Texas Civil Statutes.

[2] 4 U.S.C. §§ 104-110 (set forth in Appendix I hereof).

"(1) There is hereby levied an occupation tax on the business or occupation of producing gas within this State, computed as follows:

A tax shall be paid by each producer on the amount of gas produced and saved within this State equivalent to seven and one-half percent (7½%) of the market value thereof as and when produced. . . ."

20A Vernon's Texas Civil Statutes, Taxation-General, Article 3.02:

"(1) The market value of gas produced in this State shall be the value thereof at the mouth of the well; however, *in case gas is sold for cash only, the tax shall be computed on the producer's gross cash receipts.* Payments made by purchasers to producers for the purpose of reimbursing such producers for taxes due hereunder shall not be considered a part of the producer's gross cash receipts. *In all cases where the whole or a part of the consideration for the sale of gas is a portion of the products extracted from the producer's gas or a portion of the residue gas, or both,* the tax shall be computed on *the gross value of all things of value received by the producer, including any bonus or premium; . . . .*" (emphasis added)

20A Vernon's Texas Civil Statutes, Taxation-General, Article 4.02:

"(1) There is hereby levied an occupation tax on oil produced within this state. . . . Provided, however, that the occupation tax herein levied on oil shall be four and six-tenths percent (4.6%) of the market value of said oil whenever the market value thereof is in excess of One Dollar ($1) per barrel of forty-two (42) standard gallons. *The market value of oil,* as that term is used herein, *shall be the actual market value thereof plus any bonus or premiums or other things of value paid therefor* or which such oil will reasonably bring if produced in accordance with the laws, rules and

regulations of the State of Texas." (emphasis added)

Sections 351, 352 and 357 of Title 30, U.S.C. (part of the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 351, *et seq.*) are set forth in Appendix II hereof.

STATEMENT

This litigation concerns the jurisdiction of the State of Texas to levy its oil and gas production taxes on Petitioner's oil and gas production business operations conducted on the Corpus Christi Naval Air Station, a federal enclave wherein exclusive jurisdiction has been granted by the State of Texas, save only the right to serve process and certain qualifications in the Deed of Cession concerning duration and the tax exempt status of such lands.

Petitioner has produced oil and gas under a federal oil and gas lease since May of 1963, and from 1963 until April of 1967 paid the Texas oil and gas production business-privilege taxes without protest. Since 1967, said taxes have been paid under protest and this suit was instituted for their recovery.

The state oil and gas production business-privilege taxes here in question are income taxes as defined in the Buck Act and are measured in the same manner as "gross income" from such production operations is measured under 26 U.S.C. § 613 (Internal Revenue Code) which provides for a percentage depletion based on "gross income" from the property.

Petitioner calculates income for federal depletion purposes and income for purposes of the state production taxes *as to these production operations,* in one and the same manner and has, therefore, reported the same amounts, to the dollar, as "value" for Texas oil and

gas production business tax purposes and as "gross income" for depletion purposes under 26 U.S.C. § 613. (See Answer to Request for Admissions, Stipulation of Facts, p. 5, and Texas Supreme Court Opinion, 478 S.W.2d 926, 931-932; Pet.App. 43.)

Depletion is taken by Petitioner when the crude minerals are produced and at that time the deduction is allowed from income.* (Statement of Facts, p. 45)

ARGUMENT

The fact that no conflict of decisions exists, and the very limited circumstances under which the questions here presented can arise, illustrate that this question is not one which warrants review by this Court on Petition for Writ of Certiorari.

Before the Buck Act definition can be in issue, the land involved must be in an area of exclusive federal jurisdiction, must have been acquired by the federal government after 1920† and must be located in a State that has a selective income or value received measure in its tax on that business. Also the oil or gas deposits must be in an already existing field where outside production is *actually* draining the federal mineral deposits, for it is the inherent right of the executive division of government to protect federal property that authorizes the making of this type of lease. The ordinary lease would be made under the Mineral Leas-

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*The underlying theory of the deduction is to allow ". . . a tax-free return of the capital consumed *in the production of gross income through severance.*" (emphasis added) *Anderson* v. *Helvering*, 310 U.S. 404 (1940) page 408.

†If such lands were acquired prior to that time, or if the land was originally part of the public domain, the Mineral Leasing Act of 1920, 30 U.S.C. § 181, *et seq.*, would apply and 30 U.S.C. § 189 consents to taxation of the lessee's production business under *Mid-Northern* v. *Walker*, 268 U.S. 45 (1925).

ing Act for Acquired Lands which consents to the tax in issue here.

I

The tax in issue here falls within the Buck Act definition of income tax and the decision below is clearly correct.

In *Howard* v. *Commissioners of the Sinking Fund of the City of Louisville,* 344 U.S. 624 (1953), which involved the Buck Act and State taxation within a federal enclave in a portion of Louisville, this Court held that it did not matter that the tax involved was not an "income tax" by Kentucky law. Since the tax there involved was measured by, and levied with respect to, the income *from the taxed activity,* it was a Buck Act income tax even though not denominated or classified as an income tax under local law, and even though it reached only certain items of income.

The question here is whether the Texas oil and gas production taxes are taxes "with respect to, or measured by" income or receipts from the business-privilege taxed.

The legislative history of the Buck Act[4] clearly demonstrates an intent of Congress to expand the application of the terms "income tax", "gross income", "gross receipts" and "net income"[5] past any set definition or concept of those terms, and to allow any tax levied on, with respect to, or measured by income or receipts from the business taxed. Congressional intent to get away from a concept of only one type of income tax is shown in Senate Report No. 1625,[6] as follows:

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[4] 4 U.S.C. §§ 104-110

[5] 4 U.S.C. § 110(c)

[6] S.Rep. No. 1625, 76th Cong., 3d Sess. 5 (1940)

> "[t]his definition [of income tax] . . . *must of necessity cover a broad field because of the great variations* to be found between the different State laws. The intent of your committee in laying down such a broad definition was to include therein any State tax (whether known as a corporate franchise tax, *or business-privilege tax,* or any other name) if it is to be levied on, with respect to, or measured by, net income, gross income, or gross receipts." (emphasis added)

The type of state taxes referred to, especially the business-privilege taxes, demonstrate beyond any serious doubt the intent of Congress to include any tax that was levied on, with respect to, or measured by income or receipts from the business taxed, including those which do not necessarily result in a sales transaction, but where the gain and benefit is equally enjoyed. The Texas oil and gas production taxes as measured on Petitioner's production operations here involved, are unmistakably *measured by* the income and receipts of these business operations and are taxes *related to* such income and receipts.

The Texas Supreme Court in this case, held in 478 S.W. 2d page 931, (Pet.App. 42-43) that:

> "The Texas oil production and gas production taxes attach when these minerals have been produced and severed from the earth, *when they have been reduced to possession and have come within the dominion and control of the producer.* . . . The tax, as applied in this case is levied on and measured by the value in money or money's worth of the minerals, whether they be sold, used, or otherwise disposed of. The tax *attaches* upon the receipt and is measured by the gross value of that received." (emphasis added)

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*Petitioner cites *State* v. *Humphrey,* 159 S.W.2d 162 (Tex. Civ.App. 1941, no writ) and two opinions of the State Attorney General for the proposition that only severance is re-

The gas production business tax statute specifically states that the measure is the gross cash receipts from gas sold for cash and the value received from gas sold for other than cash. Where there is not a sale at the point where the production business ceases, however, the value received is used just as it is used to determine "gross income" from such business activities under 26 U.S.C. § 613. As we have stated, the measures used by Petitioner to calculate "gross income" under Section 613, and "value" both as to gas and oil for purposes of the State taxes are the same with respect to their production business operations here involved.

That the same measure applies as to the oil production business is shown by the opinion of the Texas Supreme Court in this case.

The gas production business tax statute also specifically states that the gas must be "saved" and under the opinion of the Texas Supreme Court in this case, this same rule applies with respect to oil production. The court has construed the taxes, both as to oil and gas production operations, to attach when the oil and gas have been reduced to the possession, dominion and control of the producer. The Texas Supreme Court stated, 478 S.W.2d, at 931 (Pet.App. 43):

> "At that point there has been an inflow of wealth, an accretion to wealth, an economic gain in money or money's worth."

Where the producer sells his production at the end of such production operations, gross receipts from that sale would reflect the true income, receipts, and value

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quired for the tax to be due as to oil production. That unreviewed opinion of a state appellate court and the opinions of the State Attorney General are on facts wholly dissimilar from those at bar. Furthermore, in so far as *State* v. *Humphrey* might say what Petitioner says, *it is clearly overruled by the Texas Supreme Court in this case.*

received from said operations.[9] Where it is not sold at this point, fair market value reflects the true income of the production business.

A use or disposition of the production without its sale cannot be excluded from income, receipts, or value received from the business-privilege as this would create an unjustifiably arbitrary and unfair discrimination between independent and integrated production businesses when both engage in the same taxable business-privilege of producing oil and gas, and the gain and benefits are equal to each producer from the income producing activity.

Petitioner refers to the fact in its petition that both the oil and gas production taxes have minimum measures not involved here which are not related to the gross income or value received from the production operations. Such measures are a specific amount per barrel or m.c.f. (~~million~~ Thousand cubic feet of gas) and are indeed unrelated to income from the business.[10] Petitioner does not contend that such measures or any other special measures are involved here but believes that their inclusion in the taxing statutes prohibits those statutes from consideration as an "income tax" under the Buck Act even though the income related measure is the only one used with regard to the business operations here in question.

Petitioner argues that under the Buck Act, receipts or income as used in the Section 110(c) defini-

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[9]What the producer sells its mineral products for at this point is the measure of value used for both the Texas oil and gas production business taxes and the measure of "gross income" under 26 U.S.C. § 613.

[10]Such measures have not been used since oil has sold for $1.00 or more per barrel and since gas has sold for 1 cent or more per m.c.f..

tion of income tax, means only receipts on income resulting from sales transactions.

The sales tax provisions in 4 U.S.C. §§ 105 and 110(b) already allow taxes on receipts resulting from sales. (set out in Appendix I). It is true that "gross income" and "gross receipts" will include taxes measured by sales generated receipts or income, but these terms are not limited to sales receipts, and in fact *such a limitation would completely nullify any meaningful effect* of such terms as defined in the Buck Act. This clearly is not the effect intended, and the congressional intent to allow *gross income and receipts related taxes* on all business pursuits taxed by the states, including those that do not necessarily result in a sales transaction, even though there is equally as much benefit, wealth, gain, and income derived and enjoyed from the pursuit of that business, is unmistakably shown by the legislative history.

There is not a better example of this type of business than the mineral extraction industry, where integration can do away with the need for sales transactions in order to derive the benefits and gain from the business.[11]

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[11]Many states have mineral production related taxes which specify income or proceeds as the measure and in every case such tax measures are construed as the value of minerals as the Texas production business taxes are measured and as "gross income" under 26 U.S.C. § 613, is measured. *Klies* v. *Linnane*, 117 Mont. 59, 156 P.2d 183 (1945); *United States Smelting, Refining & Mining Co.* v. *Haynes*, 176 P.2d 622 (Utah, 1947); *Forbes* v. *Thomas Gracy Consolidated Virginia Mining Company*, 94 U.S. 313, (Nevada, 1877); *Missouri K. & T. Ry. Co.* v. *Meyers*, 204 F.2d 140 (Oklahoma, 1913). Value of Production has also been used to determine income for taxes other than those levied with respect to the business itself. *Magnolia Petroleum Co.* v. *Oklahoma Tax Commission*, 121 P.2d 1008 (1941); *Texas Company* v. *W. A. Cooper*, 107 So.2d 676 (La.Sup. 1958).

Business-privilege taxes are much more limited in scope than general income taxes and are not tied to a sale or exchange *since the taxable event is the doing of business and not the transaction* that may or may not take place in conjunction with the business operation. Petitioner's position presumes that sales or exchanges are the only taxable event contemplated by the Buck Act. This simply is not the case.

The measure of selective "gross income" from the standpoint of a mineral producer's production activities, is provided in the federal tax laws, in 26 U.S.C. § 613. This measure is used to determine the percentage depletion allowance that may be deducted from the gross income of a producer to allow him a tax-free return of capital *consumed in the production of gross income through severence.*[11] The capital so consumed is the minerals *in situ* produced as income through severence. The depletion deduction is expressed as a percentage of the "gross income" from the property (Internal Revenue Code of 1954, 26 U.S.C. § 613) and "gross income" from the property is defined in the Income Tax Regulations, § 1.613, as follows:

> "In the case of oil and gas wells, gross income from the property, as used in Section 613(c)(1), means the amount for which the taxpayer sells the oil or gas in the immediate vicinity of the well. If the oil or gas is not sold on the premises but is manufactured or converted into a refined product prior to sale, or is transported from the premises prior to sale, the gross income from the property shall be assumed to be equivalent to the representative market or field price of the oil or gas before conversion or transportation."

In the case before us, the gross income from the property with respect to the Corpus Christi Naval Air

[11]See footnote 3, supra.

Station lease reported by Petitioner for federal income tax depletion purposes is the same, to the dollar, as the market value of produced oil and gas from those leases reported by Petitioner for Texas occupation tax purposes. Said gross income includes the value of all production regardless of the method of its disposition.

This depletion allowance is taken by Petitioner when the minerals are produced (p. 45, Statement of Facts) just as the business-privilege taxes are levied when the minerals are produced and reduced to the producer's possession, dominion and control.

As stated by the Texas Supreme Court at 478 S.W.2d page 930, such taxes are levied *on or with respect to* income under the federal case law. In *Helvering* v. *Brunn*, 309 U.S. 461 (1940), this Court held that a landlord-taxpayer who had come into possession and full ownership of a building erected upon his land by a lessee who had forfeited the lease and caused a reversion to the lessor was in receipt of income. The taxpayer had claimed that the added value to his land can be considered "gain" only upon the owner's disposition of the asset. The opinion held that the gain was realized by the landlord-taxpayer in the year of repossession of the leased premises. In *Commissioner* v. *Wilcox*, 327 U.S. 404, 407 (1946) this Court held that no single criterion had been found to determine in all situations what is sufficient gain to support the imposition of an income tax. However, in *Old Colony Trust Company* v. *Commissioner*, 279 U.S. 716 (1929) and in *Commissioner* v. *LoBue*, 351 U.S. 243 (1956), this Court held that income comprehends an accession to wealth in the form of economic benefit, value in money, or money's worth. Gain of the use and dominion of a valuable good or thing is income and there is no requirement that it be sold or converted into cash. *Helvering* v. *Brunn, supra.* In

that case there was a lessor-lessee relationship as discussed above just as there is a lessee-lessor relationship in this case.

As stated by the Texas Supreme Court on 478 S.W. 2d, page 930 (Pet.App. 38-39), income ". . . may be considered as the money, or money's worth, which comes during a definite period. *It is to be distinguished from capital,* which is a fund of wealth at a particular time. See Seligman, Income Tax, 7 Encyclopedia of the Social Sciences 628-631 (1932). The essence of income is an inflow constituting an accretion to wealth, identifiable and measurable in money or money's worth, though not necessarily in cash." (emphasis added)

It has long been held by this Court that minerals produced and extracted by a miner *do not constitute capital* but that such production or extraction operations are income producing activities of a taxpayer. *Stratton's Independence* v. *Howbert,* 231 U.S. 399 (1913); *Stanton* v. *Baltic Mining Co.,* 240 U.S. 103 (1916). In the *Stratton's Independence* case, this Court held with respect to an income-measured corporate tax that there could be no deduction from gross income, allowed for the value of the minerals *in situ.* Had these mineral products been considered as capital rather than gross profits such a deduction would have applied. Later in the *Stanton* case, dealing with the federal corporate excise tax measured by income, this Court reaffirmed and clarified its holding in the *Stratton's Independence* case and though agreeing that such a tax was on the product of the mine, stated with respect to the taxpayer's argument that it:

> ". . . moreover rests upon the wholly fallacious assumption that looked at from the point of view of substance *a tax on the product of a mine is* necessarily in its essence and nature in every case a direct tax on the property because of its owner-

ship unless adequate allowance be made for the exhaustion of the ore body to result from working the mine. We say wholly fallacious assumption because independently of the Sixteenth Amendment it was settled in Stratton's Independence v. Howbert, 231 U.S. 399, *that such a tax is not a tax upon property* as such because of its ownership, *but a true excise levied on the results of the business of carrying on mining operations"* (pp. 413 *et seq.*) (emphasis added)

These two cases clearly show that an income measured tax with respect to the mineral production business, is a tax on the product of the mine and was a true excise on the results of the business of carrying on mining operations. The Texas oil and gas production taxes are equally measured by the income, or are related to the income or receipts of the mineral production business.

In *Alexander* v. *King,* 46 F.2d 235 (10th Cir. 1931), 74 A.L.R. 174, the Court of Appeals for the Tenth Circuit referred to the *Stratton's Independence* and *Baltic Mining* cases, *supra,* stating: (page 240)

> "In Stratton's Independence v. Howbert, 231 U.S. 299, 34 S.Ct. 136, L.Ed. 285, the taxpayer mined goldbearing ore from beneath its own lands. *The value of the ore recovered, less the cost of recovery, was treated as income under the Corporation Tax* Act (36 Stat. 11, 112, c. 6). . . .
>
> . . .
>
> "Stanton v. Baltic Mining Co., 240 U.S. 103, 36 S.Ct. 278, 60 L.Ed. 546, involved the Income Tax Law of 1913. The court approved of the doctrine of the Stratton case, and held that *the proceeds from mining operations—the value of the ore less the cost of recovery—was income,* and that the tax was not a property tax because the statutory al-

lowance for depreciation might be inadequate." (emphasis added)

For purposes of taxation it has been held both in England and in this country that the product of a mine is a proper subject of taxation under income tax laws. *New Creek Co.* v. *Lederer,* 295 Fed. 433, (3rd Cir. 1924), cert.den. 265 U.S. 581, 44 S.Ct. 456, 68 L.Ed. 1190.

Petitioner does not question the fact that the measure here involved is one of benefits, wealth, and gain derived from the production operations. A tax on the product of a mine or other mineral extraction business, is a tax on the results of that business[13] such as Petitioner's production business activities carried on within the federal enclave.

II

The decisions of the Texas Courts are correct by reason of the qualifications contained in the Deed of Cession and by reason of the consent to tax given in the Mineral Leasing Act for Acquired Lands

The arguments here presented are additional reasons for denying the Petition for Certiorari under the authority of *Langres* v. *Green,* 282 U.S. 531, 535-539; *Walling* v. *General Industries Co.,* 330 U.S. 545, 547; and *Jaffke* v. *Dunham,* 352 U.S. 280, 281, which allow Respondents to urge arguments rejected or not passed upon by the court below as reasons not to grant the petition for writ of Certiorari. The Texas Court held that such lease did not effect a recession of jurisdiction over the mineral deposits and that court did not reach any questions concerning the coverage of the mineral leasing laws. That court recognized that these questions,

[13] *Stanton* v. *Baltic Mining Co.,* 240 U.S. 103 (1916).

including the question of recession, were controlled by federal law.

We believe that the Texas Court should have held that under the federal law governing the effect of the qualifications and the lease, a partial recession of jurisdiction over the mineral deposits sufficient to permit taxing was effected.

The Deed of Cession contains the following language:

> "That I, W. Lee O'Daniel, Governor of the State of Texas, in the name and in behalf of the State of Texas, do hereby cede exclusive jurisdiction over the said land, to use, occupy, own, possess and exercise jurisdiction over same *as long as the same remains the property of the United States of America, . . .*" (emphasis added)
>
> "This Deed of Cession is made pursuant to Articles 5242, 5247 and 5248 of the Revised Civil Statutes of Texas, 1925, and in accordance therewith the United States of America shall be secured in its possession and enjoyment of all said lands, and said lands and all improvements thereon *shall be exempt from any taxation under the authority of the State of Texas, so long as the same are held, owned, used, and occupied by the United States of America for any of the purposes expressed in the foregoing statutes and not otherwise.*'"[1] (emphasis added)

United States Acceptance Provision:

> "Pursuant to the provisions of the aforesaid act, jurisdiction is hereby accepted on behalf of the United States of America in the manner and form ceded by a certain Deed of Cession from the Governor of Texas to the United States of America, dated December 12, 1940, over certain lands de-

[1] The purposes enumerated in Articles 5242, 5247, and 5248, do not include the use of the land for mineral production.

scribed therein which are in the custody of the Navy Department, to wit, ..."

Even if complete title is not vested in the lessee a real property interest in the deposits is conveyed equal to the lessee-Petitioner's right to extract the oil and gas and to appropriate same to its own use and benefit." *It is only this jurisdiction over the right to produce and appropriate the oil and gas deposits, conveyed to Petitioner, that Respondents contend was receded for taxing purposes.*

An interest in real property at least equal to the right to drill for, extract, and dispose of the mineral deposits, was conveyed and to the extent of that interest a recession occurred under the terms of the Deed of Cession.

Petitioner does not argue with the fact that a Deed of Cession may provide qualifications, but only that the lease did not effect a recession. In *Palmer* v. *Barrett*, 162 U.S. 399 (1895) this Court construed a similar qualification of a grant of exclusive jurisdiction as follows, 162 U.S. at 403:

> "Looking at that act, we find . . . that it was therein expressly provided 'that the United States may retain such use and jurisdiction as long as the premises described shall be used for the purposes for which jurisdiction is ceded, and no longer . . .' . . . The power of the State to impose this condition is clear."

"The Granting Clause of Petitioner's Protective Oil and Gas Lease provides: "In consideration of rents and royalties to be paid, and the conditions and covenants to be observed as herein set forth, the lessor does hereby grant to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits owned by the lessor, except helium gas, in or under the following-described land situated in . . . ." The Lease's duration is for so long as oil and gas are produced in paying quantities.

A lease of vacant lands adjoining the Naval yard had been made to the City of Brooklyn for market purposes and this Court held that said land was "clearly not used by the United States and occupied by it for a naval yard or naval hospital." (162 U.S. at 403) and that, 162 U.S. at 404:

> ". . . the case then presents the very contingency contemplated by the act of cession, that is, the exclusion from the jurisdiction of the United States of such portion of the ceded land not used for the governmental purposes of the United States therein specified. . . . it is clear that under the circumstances here existing in view of the reservation made by the State of New York in the act ceding jurisdiction, the *exclusive authority* of the United States over the land covered by the lease *was at least suspended* whilst the lease remained in force." (emphasis added)

In *Humble* v. *Waggoner*, 376 U.S. 369 (1964), this Court referred to the holding of the *Palmer* case,[11] but distinguished it on the grounds that in the *Waggoner* case, which concerned an oil and gas lease, the authorizing statute contained no conditions. Here the Deed of Cession is a *qualified* grant of jurisdiction over and reservation of the right to tax the property. Here the taxes are on the use of a part of the "land" conveyed in the Deed of Cession and measured by the value of the use of said portion of the "land". An interest in land (whether a full fee-simple title in, or only an exclusive right to use or take a portion of said land) was conveyed by the lease, such interest no longer remains in the United States, and jurisdiction is receded to the extent of such interest, the use of which is here taxed. It is Respondents' position that this recession of jurisdiction and right to tax whatever interest was thereby

[11] 376 U.S. at 371, n.3.

conveyed, gives the State the corollary right to tax the use and benefits arising directly from that interest.

The second reason not reached by the court below is that the Mineral Leasing Act for Acquired Lands[11] *provides Congressional consent to levy the Texas production taxes,* 30 U.S.C. § 357.[12] This Section contains the same language construed by this Court, with reference to Section 189 of the Mineral Leasing Act,[13] in *Mid-Northern Oil Company* v. *Walker,* 268 U.S. 45 (1925), where it was held that:

> "... *the authority of the state* [to levy an annual license tax measured by the gross value of the oil produced] *exists in virtue of such* [congressional] *consent.* Section 32 (41 Stat. 450) [now 30 U.S.C. § 189] ...." 268 U.S. 48. (emphasis added)

An exception of mineral deposits in military lands[14] from the Mineral Leasing Act for Acquired Lands was explained by the legislative history which showed that such mineral deposits were not suitable for mineral development.[15] Here this reasoning does not apply as these deposits and the lands are being developed for their minerals and the exception should not apply when such lands are, *in fact,* suitable for mineral development. The inherent power of the executive de-

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[11]30 U.S.C. § 351, *et seq.*

[12]Set out in Appendix II hereof.

[13]30 U.S.C. § 181, *et seq.*

[14]Said exception in Section 352 is set forth in Appendix II hereof. See also footnote 7, *supra.*

[15]The legislative history of the Act shows that the exception of military lands from its coverage was based on the assumption, and inserted only because, such lands were not suitable for mineral development: "The bill would except from its provisions certain lands which obviously are not suitable for mineral development such as military lands and surplus lands subject to early disposal." H.R. No. 550, 1947, 80th Cong., 1st Sess. (1947). (U.S. *Code Congressional Service,* 80th Cong., 1st Sess., p. 1666.)

partment to make protective leases should be constructed in accord with the congressional scheme of the mineral leasing acts because otherwise unregulated mineral development contrary to the primary purpose of all the federal mineral leasing laws, and in conflict with the requirement of such congressional authorization contained in Article 4, Section 3, Clause 2, of the United States Constitution is allowed.

The exception in 30 U.S.C. § 352 should not be construed to reach a result obviously and clearly not intended nor contemplated by Congress. The exception provision can be and should be construed to accomplish only the purpose for which it was inserted by Congress by restricting its application to those lands not, in fact, suitable for mineral development, in conformity with said congressional intent and purpose.

CONCLUSION

In conclusion we would emphasize the fact that there is no conflict of decisions between the lower courts and the question here raised is not of sufficient importance to warrant review by this Court.

Leases such as Petitioner's are not a common or ordinary method of leasing federal mineral deposits as there must be drainage from such deposits allowing the exercise of the inherent power to protect such deposits even though the federal mineral leasing laws do not apply to such lands. Of course, we have argued that such laws should apply, and allow the taxes here in question once the lease is actually made.

If such leases were common or were to become common, Congress would surely clarify its position with respect to the coverage of such leases under the mineral leasing laws, particularly 30 U.S.C. § 352, and if the statute does not apply to a lease such as peti-

tioner's, Congress would have to provide some authority to make such leases as the United States Constitution requires in Article 4, Section 3, Clause 2.

The small number of leases of this type negates the position that the lower court decision would significantly diminish, if effect at all, bonus moneys received by the Federal Government. Likewise, its royalties would be effected very little, if at all, by the lower court's decision. All other producers in the same oil or gas field wherein this type of lease must exist, pay the business-privilege taxes.

The fact that no conflict of decisions exists or has been asserted, and the narrow scope of this question as shown by the limited circumstances under which it can arise, illustrate that this question is not one which warrants review by this Court on Petition for Writ of Certiorari.

PRAYER

For the reasons shown above, Respondents respectfully pray that the Petition for Writ of Certiorari be denied by this Court.

Respectfully submitted

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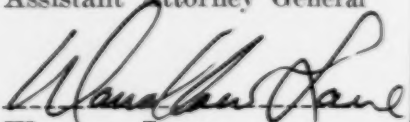

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APPENDIX I

Buck Act, 4 U.S.C. § 104 *et seq.* (54 Stat. 1059-1060):

4 U.S.C. § 104 (Originally amended in Section 7 of Buck Act, 54 Stat., 1060):

§ 104. Tax on motor fuel sold on military or other reservation[1] reports to state taxing authority

(a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.

(b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory, or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel with respect to which taxes are payable under subsection (a) for the preceding month.

(c) As used in this section, the term "Territory" shall include Guam, July 30, 1947, c. 389, § 1, 61 Stat. 641, amended Aug. 1, 1956, c. 827, 70 Stat. 799.

4 U.S.C. § 105 (Section 1 of Buck Act, 54 Stat., 1059):

§ 105. State, and so forth, taxation affecting federal areas; sales or use tax

(a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940. July 30, 1947, c. 389, § 1, 61 Stat. 641.

4 U.S.C. § 106 (Section 2 of Buck Act, 54 Stat., 1061):

§ 106. Same; income tax

(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received

after December 31, 1940. July 30, 1947, c. 389, § 1, 61 Stat. 641.

4 U.S.C. § 107 (Section 3 of Buck Act, 54 Stat., 1060):

§ 107. Same; exception of United States, its instrumentalities, and authorized purchases therefrom

(a) The provisions of sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of personnel of any branch of the Armed Forces of the United States, under regulations promulgated by the departmental Secretary having jurisdiction over such branch. July 30, 1947, c. 389, § 1, 61 Stat. 641, amended Sept. 3, 1954, c. 1263, § 4, 68 Stat. 1227.

4 U.S.C. § 108 (Section 4 of Buck Act, 54 Stat., 1060):

§ 108. Same; jurisdiction of United States over Federal areas unaffected

The provisions of sections 105 to 110 of this title shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit

the jurisdiction of the United States over any Federal area. July 30, 1947, c. 389, § 1, 61 Stat. 641.

4 U.S.C. § 109 (Section 5 of Buck Act, 54 Stat., 1060):

§ 109. Same; exception of Indians

Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed. July 30, 1947, c. 389, § 1, 61 Stat. 641.

4 U.S.C. § 110 (Section 6 of Buck Act, 54 Stat., 1060):

§ 110. Same: definitions

As used in sections 105-109 of this title—

(a) The term "person" shall have the meaning assigned to it in section 3797 of title 26.

(b) The term "sales or use tax" means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of section 104 of this title are applicable.

(c) The term "income tax" means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.

(d) The term "State" includes any Territory or possession of the United States.

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State. July 30, 1947, c. 389, § 1, 61 Stat. 641.

APPENDIX II

30 U.S.C. §§ 351, 352 and 357:

30 U.S.C. § 351, in part:

"As used in this Chapter 'United States' includes Alaska. 'Acquired lands' or 'lands acquired by the United States' include all lands heretofore or hereafter acquired by the United States to which the 'mineral leasing laws' have not been extended. . . ."

30 U.S.C. § 352, in part:

". . . all deposits of . . . oil, oil shale, gas, . . . which are owned or may hereafter be acquired by the United States (exclusive of such deposits in such acquired lands as are . . . (b) set apart for military or naval purposes, . . .) may be leased by the Secretary under the same conditions as contained in the leasing provisions of the mineral leasing laws, . . ."

30 U.S.C. § 357, in part:

"Nothing contained in this Chapter shall be construed to affect the rights of the State . . . to exercise any right which they may have with respect to properties covered by lease issued under this Chapter, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States."